IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 19-12548-GG

ANTOINETTE MARQUES,

Plaintiff - Appellant,

versus

JP MORGAN CHASE, N.A.,

Defendant - Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

BEFORE: MARTIN, ROSENBAUM, and BRANCH, Circuit Judges.

PER CURIAM:

The Petition for Panel Rehearing filed by the Appellant, Antoinette Marques, is DENIED.

ORD-41

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-12548
Non-Argument Calendar

D.C. Docket No. 1:16-cv-01215-LMM

ANTOINETTE MARQUES,

Plaintiff - Appellant,

versus

JP MORGAN CHASE, N.A.,

Defendant - Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

(February 20, 2020)

Before MARTIN, ROSENBAUM, and BRANCH, Circuit Judges.

PER CURIAM:

Antoinette Marques, *pro se*, appeals the denial of her post-judgment motions, under Rules 59(e) and 60(b) of the Federal Rules of Civil Procedure, seeking relief

from the district court's order granting summary judgment on Marques's complaint against JP Morgan Chase, N.A. ("Chase"), alleging various claims arising out of the foreclosure of her home.[1] The court denied the Rule 59(e) motion as untimely and the Rule 60(b) motion as an attempt to relitigate matters that had already been addressed. After careful review, we affirm.

We review for an abuse of discretion the denial of a motion under Rule 59(e) or Rule 60(b) of the Federal Rules of Civil Procedure. *Arthur v. King*, 500 F.3d 1343 (11th Cir. 2007) (Rule 59(e)); *Rice v. Ford Motor Co.*, 88 F.3d 914, 918 (11th Cir. 1996) (Rule 60(b)).

We first consider Marques's Rule 59(e) motion. Rule 59(e) permits a party to file a motion to alter or amend the judgment. Fed. R. Civ. P. 59(e). Relief is proper

[1] On September 19, 2019, we entered an order dismissing the appeal as to the underlying final judgment but allowing the appeal to proceed as to the denial of Marques's post-judgment motions. As we explained in that order, although Marques received an extension of time to file her post-judgment motions under Rules 59 and 60, Fed. R. Civ. P., these motions did not toll the time to file an appeal as they ordinarily would, *see* Fed. R. App. P. 4(a)(4), because the district court is prohibited from extending the time to file them. *Green v. Drug Enf't Admin.*, 606 F.3d 1296, 1300–01 (11th Cir. 2010) ("Because Rule 6(b)(2) prohibits extending the time to file a Rule 59(e) motion, the district court's grant of Green's motion for extension of time to file his motion for reconsideration did nothing to toll the time in which he had to file his Rule 59(e) motion."). As a result, Marques's notice of appeal, though timely as to the denial of her post-judgment motions, was not timely to appeal the final judgment. This was no fault of Marques, a *pro se* party who simply relied on the district court. But unfortunately, we cannot excuse Marques's untimely filing because the "timely filing of a notice of appeal in a civil case is a jurisdictional requirement" that must be complied with, no matter the circumstances. *Bowles v. Russell*, 551 U.S. 205, 213–14 (2007). However, we remind district courts of these rules and the consequences for *pro se* litigants.

under Rule 59(e) only if the party presents newly discovered evidence or demonstrates a manifest error of law or fact. *Arthur*, 500 F.3d at 1343.

A motion under Rule 59(e) must be filed within 28 days of the judgment. Fed. R. Civ. P. 59(e). The district court is prohibited from extending this time period. *See* Fed. R. Civ. P. 6(b) ("A court must not extend the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b)."); *Green v. Drug Enf't Admin.*, 606 F.3d 1296, 1300–01 (11th Cir. 2010) ("To help preserve the finality of judgments, a court may not extend the time to file a Rule 59(e) motion."). Nevertheless, Rule 6(b)'s prohibition on extending the time to file under Rule 59(e) is a "claims-processing rule rather than a jurisdictional rule," which means a court may consider the merits of an untimely Rule 59(e) motion if the opposing party fails to object to the court's violation of Rule 6(b). *Advanced Bodycare Sols., LLC v. Thione Int'l, Inc.*, 615 F.3d 1352, 1359 n.15 (11th Cir. 2010).

Here, the district court properly denied Marques's Rule 59(e) motion as untimely for two reasons. First, the motion was not filed within 28 days of the judgment. *See* Fed. R. Civ. P. 59(e). And the court was not authorized to extend that time period, despite its order purporting to do so. *See* Fed. R. Civ. P. 6(b). While Rule 6(b) is a claim-processing rule that may be forfeited, Chase properly

raised its objection to the time extension at the first available opportunity.[2] Accordingly, the court did not abuse its discretion by enforcing Rule 6(b), notwithstanding its prior order, and denying the Rule 59(e) motion as untimely. *See Advanced Bodycare*, 615 F.3d at 1359 n.15.

But even if we consider the time extension to be effective, the Rule 59(e) motion was still untimely. The district court ordered that Marques "shall have through and including April 29, 2019 to submit her 59(e) Motion." However, the district court received her motion on May 2, 2019, three days late. Although it appears that Marques mailed the Rule 59(e) motion on April 29, she cannot rely on the date of mailing because—except in cases of *pro se* inmates—a document is not deemed filed until it is received by the district-court clerk. *See Houston v. Lack*, 487 U.S. 266, 273 (1988) ("[R]eceipt constitutes filing in the ordinary civil case . . . ."). So her motion was filed too late. Accordingly, the court did not abuse its discretion by enforcing the terms of its extension order.

Nor did the district court abuse its discretion in denying Marques's Rule 60(b) motion. Under Rule 60(b), courts may relieve a party from a judgment or order on several grounds, including (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence; (3) fraud; (4) the judgment is void; (5) the judgment

[2] Because the motion for extension was granted within two days of its filing, Chase did not have an adequate opportunity to raise an objection to the extension at that time. As a result, Chase was permitted to raise its objection in response to the Rule 59(e) motion.

it was within the court's discretion to consider the belated response. *See* N.D. Ga. R. 7.1(F) ("The Court, *in its discretion*, may decline to consider any motion or brief that fails to conform to the requirements of these rules." (emphasis added)); *Reese v. Herbert*, 527 F.3d 1253, 1267 n.22 (11th Cir. 2008) ("We . . . review a district court's application of local rules for an abuse of discretion.").

And in any case, even an unopposed motion does not automatically entitle the movant to relief. The district court still must assess the merits of the motion and determine whether relief is warranted under the applicable rules. *Cf. United States v. One Piece of Real Prop. Located at 5800 SW 74th Ave.*, 363 F.3d 1099, 1101 (11th Cir. 2004) ("[T]he district court cannot base the entry of summary judgment on the mere fact that the motion was unopposed, but, rather, must consider the merits of the motion."). Here, the court did so and properly denied relief under Rule 60(b).

Finally, Marques raises a number of challenges to the underlying judgment, including whether the court should have granted leave to amend. However, for the reasons explained in footnote 1, we lack jurisdiction to review that judgment. And an appeal from the denial of a Rule 60(b) motion "does not bring up the underlying judgment for review." *Cavaliere v. Allstate Ins. Co.*, 996 F.2d 1111, 1115 (11th Cir. 1993) (quotation marks omitted).

For these reasons, we affirm the denial of Marques's post-judgment motions.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ANTOINETTE MARQUES,	:	
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
JP MORGAN CHASE BANK, N.A.,	:	CIVIL ACTION NO. 1:16-CV-1215-LMM-AJB
	:	
Defendant.	:	

ORDER

This case comes before the Court on Plaintiff's Motion to Alter or Amend Clerk's Judgment and Final Order [120] and Plaintiff's Motion for Relief from Judgment [121]. After due consideration, the Court enters the following Order:

I. BACKGROUND

On February 26, 2019, this Court adopted the Magistrate Judge's Report and Recommendation ("R&R") and granted Defendant's Motion for Summary Judgment. See Dkt. No. [111]. On March 25, 2019, Plaintiff filed a Combined Motion and Memo for Extension of Time to file a 59(e) Motion, 60(b) Motion, and Appeal. See Dkt. No. [116]. The Court granted Plaintiff's Motion on March 27, 2019, extending the deadline for Plaintiff to her submit her motions through and including April 29, 2019. See Dkt. No. [117]. Plaintiff ultimately filed her

Motion to Alter or Amend Clerk's Judgment and Final Order and Motion for Relief from Judgment on May 2, 2019. See Dkt. Nos. [120; 121].

II. LEGAL STANDARD

"Parties . . . may not employ a motion for reconsideration as a vehicle to present new arguments or evidence that should have been raised earlier, introduce novel legal theories, or repackage familiar arguments to test whether the Court will change its mind." Brogdon v. Nat'l Healthcare Corp., 103 F. Supp. 2d 1322, 1338 (N.D. Ga. 2000) (internal citations omitted). Rather, to warrant vacating a final order, parties must satisfy the standards of either Rule 59(e) (motion to alter or amend a judgment) or Rule 60(b) (motion for relief from judgment or order). Region 8 Forest Serv. Timber Purchasers Council v. Alcock, 993 F.2d 800, 806 n.5 (11th Cir. 1993).

Appropriate grounds for reconsideration under Rule 59(e) include: (1) an intervening change in controlling law, (2) the availability of new evidence, and (3) the need to correct clear error or prevent manifest injustice. See Hood v. Perdue, 300 F. App'x 699, 700 (11th Cir. 2008) (citing Pres. Endangered Areas of Cobb's History, Inc. v. U.S. Army Corps of Eng'rs, 916 F. Supp. 1557, 1560 (N.D. Ga. 1995), *aff'd*, 87 F.3d 1242 (11th Cir. 1996)); Estate of Pidcock v. Sunnyland Am., *Inc.*, 726 F. Supp. 1322, 1333 (S.D. Ga. 1989). Therefore, a party "cannot use a Rule 59(e) motion to relitigate old matters, raise argument or present evidence that could have been raised prior to the entry of judgment." Michael Linet, Inc. v.

Village of Wellington, 408 F.3d 757, 763 (11th Cir. 2005). Motions under Rule 59(e) must be made within twenty-eight days of judgment. Fed. R. Civ. P. 59(e).

Likewise, appropriate grounds for reconsideration under Rule 60 include "mistake, inadvertence, surprise, or excusable neglect," newly discovered evidence, fraud, a void judgment, or a judgment that has been satisfied or is no longer applicable. Fed. R. Civ. P. 60(b). A party may also seek relief from a final judgment for "any other reason that justifies relief." Fed. R. Civ. P. 60(b)(6). Rule 60(b) motions must be made within three years of judgment. Fed. R. Civ. P. 60(c)(1).

II. DISCUSSION

To begin, Plaintiff untimely filed her Rule 59(e) Motion. A party must file a motion to alter or amend a judgment no later than twenty-eight days after the entry of judgment. Fed. R. Civ. P. 59(e). Moreover, "[t]o help preserve the finality of judgments, a court may not extend the time to file a Rule 59(e) motion." Green v. Drug Enf't Admin., 606 F.3d 1296, 1300 (11th Cir. 2010) (citing Fed. R. Civ. P. 6(b)(2)). Because Rule 6(b)(2) prohibits extending the time to file a Rule 59(e) motion, the Court's grant of Plaintiff's motion for extension of time on March 27, 2019 "did nothing to toll the time" in which Plaintiff had to file her Rule 59(e) motion. Id.; see also Brandau v. Warden, FCC Coleman-Medium, 476 F. App'x 367, 369 (11th Cir. 2012) ("Rule 59(e)'s time limit is mandatory—district courts

do not have the authority to extend this 28-day time requirement.").[1] In the instant case, the Court entered final judgment on February 26, 2019. Dkt. No. [111]. Plaintiff did not file her Motion to Alter or Amend Judgement until May 2, 2019. Dkt. No. [120]. Accordingly, Plaintiff's Motion to Alter or Amend Judgement [120] under to Rule 59(e) is **DENIED** as untimely.

Nor is Plaintiff's Motion for Relief from Judgment [121] an appropriate motion for reconsideration pursuant to Rule 60(b), as it merely repackages arguments that have previously been addressed by this Court. See Schwindler v. Owens, No. 1:11-cv-1276, 2013 WL 11327698, at *1 (N.D. Ga. Sept. 30, 2013) ("Rule 60(b) motions may not be used to rehash arguments or relitigate issues."). Indeed, Plaintiff's primary argument for relief under Rule 60(b) is that the Court erred by overlooking evidence that Defendant did not own the Note when it published the Newspaper Sale Notice in October 2014. See Dkt. No. [121] at 2-3. But as discussed at length in previous orders, the Georgia Supreme Court has made clear that "the holder of a deed to a secure debt is authorized to exercise the power of sale in accordance with the terms of the deed even if it does not also hold the note or otherwise have any beneficial interest in the debt obligation underlying the deed." Dkt. No. [25] at 17-18 (citing You v. JP Morgan Chase Bank, 743 S.E.2d 428, 433 (Ga. 2013)). Likewise, the Court has already

[1] The Court notes that, in addition to failing to file her motion with twenty-eight days of judgment, Plaintiff filed her motion three days after the extended deadline.

explained—on several occasions—that it is undisputed that Plaintiff was in default on her loan as of October 2014. See, e.g., Dkt. No. [111] at 7-8. As Plaintiff merely attempts to relitigate issues previously decided by this Court, she has failed to present grounds to justify granting the "extraordinary remedy" of relief from judgment under Rule 60(b). In re McFarland, No. 11-10218, 2016 WL 882168, at *5 (Bankr. S.D. Ga. Mar. 7, 2016). Plaintiff's Motion for Relief from Judgment [121] is therefore **DENIED**.

III. CONCLUSION

In light of the foregoing, Plaintiff's Motion to Alter or Amend Clerk's Judgment and Final Order [120] is **DENIED**. Plaintiff's Motion for Relief from Judgment [121] is **DENIED**.

IT IS SO ORDERED this 12th day of June, 2019.

Leigh Martin May
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ANTOINETTE MARQUES,

Plaintiff,

v.

JP MORGAN CHASE N.A.,

Defendant.

CIVIL ACTION NO.
1:16-CV-1215-LMM-AJB

ORDER

This case comes before the Court on the Magistrate Judge's Report and Recommendation ("R&R") [106], recommending that the Court deny Plaintiff's Motion for Judicial Notice [96] and deny her Motion to Strike [102], and that the Court grant Defendant's Motion for Summary Judgment [82] and dismiss Plaintiff's complaint with prejudice. The facts and procedural history of this case are set forth in the R&R and are fully incorporated herein by reference unless otherwise noted. Plaintiff filed objections to the R&R [109] and Defendant, in turn, filed a timely response [110]. After due consideration, the Court enters the following Order:

I. LEGAL STANDARD

Under 28 U.S.C. § 636(b)(1), the Court reviews the Magistrate Judge's Report and Recommendation for clear error if no objections are filed. 28 U.S.C. §

636(b)(1). If a party files objections, however, the district court must review *de novo* any part of the Magistrate Judge's disposition that is the subject of a proper objection. Id. As Plaintiff timely filed objections to the Magistrate Judge's findings, the Court reviews the challenged findings and recommendations on a *de novo* basis.

II. DISCUSSION

This action arises from Plaintiff's claims for attempted wrongful foreclosure and false light invasion of privacy. The Magistrate Judge concluded that (1) Plaintiff cannot establish the requisite elements of her claims; and, (2) Plaintiff's false light invasion of privacy claim is time-barred. See Dkt. No. [106] at 19, 23. Plaintiff has raised a number of objections to the R&R, which the Court will address in turn.

a. 11th Cir. R. 3-1

Plaintiff first asks the Court to disregard 11th Cir. R. 3-1, cited in the Order For Service of Report and Recommendation, which provides that where no objections are filed the Court of Appeals "will deem waived any challenge to factual and legal findings to which there was no objection." Dkt. No. [107] at 2. Because Plaintiff's objection to the application of this rule is not a proper objection to any part of the Magistrate Judge's disposition, it is overruled. See 28 U.S.C. § 636(b)(1) ("[A]ny party may serve and file written objections to [a Magistrate Judge's] proposed *findings and recommendations* . . . .") (emphasis added).

The Court recognizes that Plaintiff is proceeding *pro se* and that a document filed *pro se* is "to be liberally construed." Erickson v. Pardus, 551 U.S. 89, 94 (2007) (citations and internal quotation marks omitted); Tannenbaum v. United States, 148 F.3d 1262, 1263 (11th Cir. 1998). However, nothing in that leniency excuses a plaintiff from compliance with the threshold requirements of the Federal Rules of Civil Procedure. See Moon v. Newsome, 863 F.2d 835, 837 (11th Cir. 1998), cert. denied, 493 U.S. 863 (1989). Nor does this leniency require or allow courts "to rewrite an otherwise deficient pleading [by a *pro se* litigant] in order to sustain an action." GJR Invs., Inc. v. County of Escambia, Fla., 132 F.3d 1359, 1369 (11th Cir. 1998). As such, Plaintiff's belief that the Court should excuse her from complying with the rules of this circuit because she is *pro se* is both unfounded and inappropriate.[1]

b. Issues No Longer in Dispute

Plaintiff next argues that she did not own the Note at the time of the wrongful foreclosure, that she owed no debt, and that Defendant was not the loan servicer and therefore not entitled to foreclose. See Dkt. No. [109] at 5-7. As discussed in the R&R, these issues were previously resolved by the Magistrate

[1] This reasoning applies with equal force to Plaintiff's request that "any and all information obtained in Discovery be used in support of the appeal, even if this information was not included, overruled, or overlooked in her response." Dkt. No. [109] at 17. As discussed, Plaintiff's status as *pro se* litigant does not excuse her from compliance with the Federal Rules of Civil Procedure or the rules of this circuit. Thus, to the extent Plaintiff's request can be construed as an objection, it is overruled.

Judge—and adopted as the holding of this Court—at the motion to dismiss stage. See Dkt. No. [106] at 15. Because these issues are no longer in dispute, Plaintiff's objections are overruled.

c. Fee Disclosure Requests and Debt Disputes

Plaintiff also objects to the Magistrate Judge's finding that Plaintiff's allegations concerning a final modification agreement and Defendant's supposed failure to respond to her requests for information were immaterial to her remaining claims. See Dkt. No. [109] at 7-8. Plaintiff argues that these facts are "directly related to the tort of wrongful attempted foreclosure" because Defendant's failure to provide information prevented Plaintiff from curing the default. Id. at 8.

However, Plaintiff does not cite any authority supporting her proposition that Defendant's alleged refusal to provide "modification fee disclosures" can form the basis of her false light invasion of privacy claim. Moreover, as Defendant correctly notes, Plaintiff's inability to execute a loan modification agreement does not alter the fact that Plaintiff was in default when the notice was published. See Dkt. No. [110] at 12. Thus, the Magistrate Judge correctly concluded that such allegations are immaterial to Plaintiff's remaining claims; Plaintiff's objections are therefore overruled. [2]

[2] Plaintiff also suggests that Defendant's "failure to verify or validate the debt" indicates that the foreclosure was wrongful, and that Defendant's actions violated RESPA and TILA. Dkt. No. [109] at 7, 10. However, Plaintiff does not offer any

d. Evidentiary Objections

Plaintiff next objects to a variety of Defendant's summary judgment evidence—all of which miss the mark. See Dkt. No. [109] at 11-13. First, contrary to Plaintiff's belief, there is no requirement that Defendant authenticate documents during discovery. See, e.g., Fed R. Civ. P. 26(b)(1) ("Information within this scope of discovery need not be admissible to be discoverable."). Second, Plaintiff fails to substantiate her evidentiary objections with citations to facts or law. For example, Plaintiff argues that the Loan History provided by Defendant is inaccurate. Dkt. No. [109] at 12. But to refute the Loan History, Plaintiff offers nothing more than her own conclusory assertion that she "never missed a payment." See id.[3] It is axiomatic that mere declarations, absent specific citations to evidence, are not sufficient to establish a material issue of fact in response to a motion for summary judgment. See LR 56.1. N.D. Ga.

Finally, Plaintiff objects to the admissibility of certain evidence. See Dkt. No. [109] at 11-13. Specifically, Plaintiff contends that certain items are inadmissible as evidence—but curiously concedes that said evidence may "possibly [be] used for [the Court's] Summary Judgment decision." Dkt. No. [109] at 11. To the extent such a request can be properly characterized as an

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legal authority to support her belief that such allegations have any bearing on the claims before the Magistrate Judge. Accordingly, such objections are overruled.

[3] Despite disputing its accuracy and admissibility, Plaintiff asks the Court to note that the Loan History Defendant provided "*confirms* receipt of forbearance and trial mod. payments." Dkt. No. [109] at 13 (emphasis in original). This contradictory request further undercuts the efficacy of Plaintiff's objection.

objection under Federal Rule of Civil Procedure 56(c)(2) that "material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence," Plaintiff's concession renders her objection meritless. As such, Plaintiff's objections to the Magistrate Judge's findings with respect to evidentiary issues are overruled.

e. Equitable Tolling

Plaintiff further objects to the Magistrate Judge's rejection of her equitable tolling argument. Dkt. No. [109] at 18. Pursuant to O.C.G.A. § 9-3-33, claims for false light invasion of privacy must be brought within "one year after the right of action accrues." Georgia law does provide an "extremely narrow" non-statutory doctrine of equitable tolling. Hicks v. City of Savannah, No. CV408-006, 2008 WL 2677128, at *2 (S.D. Ga. July 8, 2008). As discussed in the R&R, where a plaintiff seeks equitable tolling on the basis of fraud, "[t]he statute of limitations is tolled until the fraud is discovered or by reasonable diligence *should have been discovered.*" Dkt. No. [106] at 21 (quoting Hamburger v. PFM Capital Mgmt., Inc., 649 S.E.2d 779, 784 (Ga. Ct. App. 2007) (internal citation omitted) (emphasis added)).

Here, Plaintiff concedes that she filed her false light claim six months past the statutory deadline. See Dkt. No. [109] at 18. Nevertheless, Plaintiff argues that her claim should be equitably tolled because Defendant utilized "mafia-style scare tactics that were quite effective in paralyzing [Plaintiff]" and thus prevented her from filing her case on time. Id. at 20. But, as recognized by the Magistrate

Judge, Plaintiff's stated reasons for failing to file suit on time—namely, Defendant's representative's visits to Plaintiff's home—indicate that Plaintiff was fully aware of the alleged fraud.[4] See Dkt. [106] at 23. Accordingly, Plaintiff has not demonstrated that the doctrine of equitable tolling is applicable to the instant case.

As a final matter, Plaintiff offers no legal support for her argument that because six months is "arguably a short time," the Court should permit her time-barred claim to proceed "in the interest of justice." Dkt. No. [109] at 20. Plaintiff's objections with respect to the Magistrate Judge's findings as to equitable tolling are therefore overruled.

f. Plaintiff's Loan Default

Plaintiff's remaining objections focus on her repeated assertion that she had never missed a payment when Defendant "declared the debt in default on Jan. 3, 2013." Dkt. No. [109] at 14. As explained at length in the R&R, Plaintiff only provided her own affidavit and a letter from Defendant declaring her in default as evidence that she was *not* in default. See Dkt. No. [106] at 12-13. A general refutation is simply insufficient to raise a genuine dispute of material fact. See id. at 13 (citing LR 56.1(B)(2)(a)(2), N.D. Ga.). And, despite Plaintiff's

[4] Indeed, Plaintiff admits that she pursued her rights "to the extent of her ability" prior to filing this suit by sending at least five cease and desist letters and lodging complaints with the Consumer Financial Protection Bureau. See Dkt. No. [109] at 19-20. Plaintiff's own actions thus indicate awareness of the alleged fraud, thereby undermining her argument for equitable tolling.

repeated argument that her partial payments to Defendant under the Affordable Unemployment Program ("UPA") and Trial Payment Plan ("TPP") were current, Plaintiff fails to acknowledge that neither document waived her obligations under the Loan Agreement. See id. at 15-16; see also Dkt. No. [109] at 14-16. As such, the Magistrate Judge correctly determined that "Plaintiff was in default as early as November 2, 2012, and Plaintiff has offered no evidence that she cured this default or otherwise entered another type of forbearance or loan modification agreement by the time Defendant published the foreclosure notices in 2014." Dkt. No. [106] at 18-19. Thus, Plaintiff's objections are overruled.

III. CONCLUSION

In accordance with the foregoing, the Court **ADOPTS** the Magistrate Judge's R&R [106] as the Order of this Court. Defendant's Motion for Summary Judgment is **GRANTED** and Plaintiff's Complaint is **DISMISSED WITH PREJUDICE**. The Clerk is **DIRECTED to CLOSE** this case.

IT IS SO ORDERED this 26th day of February, 2019.

Leigh Martin May
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ANTOINETTE MARQUES,	:	
	:	
Plaintiff,	:	**CIVIL ACTION FILE NO.**
	:	**1:16-cv-1215-LMM-AJB**
v.	:	
	:	
JP MORGAN CHASE N.A.,	:	
	:	
Defendant.	:	

UNITED STATES MAGISTRATE JUDGE'S ORDER
AND FINAL REPORT AND RECOMMENDATION

This matter is before the Court on the motion for summary judgment filed by Defendant JP Morgan Chase N.A. ("Chase" or Defendant). [Doc. 82]. Plaintiff also has filed a motion to take judicial notice, [Doc. 96], and what is construed as a motion to strike. [Doc. 102]. For the reasons set forth below, the undersigned **RECOMMENDS** that the District Judge **GRANT** Defendant's motion and **DISMISS** Plaintiff's complaint **WITH PREJUDICE**. Plaintiff's motions for judicial notice, [Doc. 96], and to strike, [Doc. 102], are **DENIED**.

I. Summary Judgment Standard

Summary judgment is proper when no genuine issue as to any material fact is present, and the moving party is entitled to judgment as a matter of law.

Fed. R. Civ. P. 56(a). The moving party carries the initial burden of "informing the court of the basis for its motion and of identifying those materials that demonstrate the absence of a genuine issue of material fact." *Rice-Lamar v. City of Fort Lauderdale*, 232 F.3d 836, 840 (11th Cir. 2000) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). A fact is "material" if it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The moving party may also meet its burden by pointing out that there is an absence of evidence to support an element of the case on which the nonmoving party bears the burden of proof. *Celotex Corp.*, 477 U.S. at 325. "Only when that burden has been met does the burden shift to the non-moving party to demonstrate that there is indeed a material issue of fact that precludes summary judgment." *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991).

The nonmoving party is then required "to go beyond the pleadings" and present competent evidence in the form of affidavits, depositions, admissions, and the like, designating "specific facts showing that there is a genuine issue for trial." *Celotex Corp.*, 477 U.S. at 324. "The mere existence of a scintilla of evidence" supporting the nonmovant's case is insufficient to defeat a motion for summary judgment. *Anderson*, 477 U.S. at 252. "[F]acts must be viewed in the light most favorable to the nonmoving

party only if there is a 'genuine' dispute as to those facts." *Scott v. Harris*, 550 U.S. 372, 380 (2007). "When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Id.* If the record does not blatantly contradict the nonmovant's version of events, the court must determine "whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented." *See Anderson*, 477 U.S. at 252; *see also EPL Inc. v. USA Fed. Credit Union*, 173 F.3d 1356, 1362 (11th Cir. 1999); *Duke v. Cleland*, 884 F. Supp. 511, 514 (N.D. Ga. 1995). "If the record presents disputed issues of material fact, the Court may not decide them; rather, it must deny the motion and proceed to trial." *FindWhat Inv. Grp. v. FindWhat.com*, 658 F.3d 1282, 1307 (11th Cir. 2011) (citing *Tullius v. Albright*, 240 F.3d 1317, 1320 (11th Cir. 2001)).

II. Procedural History

On April 15, 2016, Plaintiff filed a pro se complaint in this Court against Defendant, alleging violations under the Fair Debt Collections Practices Act ("FDCPA"), the Real Estate Settlement Procedures Act ("RESPA"), and the Fair Credit Reporting Act ("FCRA"). [Doc. 1]. Plaintiff's complaint also alleged state law claims

for trespass, invasion of privacy, harassment and stalking, libel, attempted wrongful foreclosure, and "abuse of civil process." [*Id.*]. Fairly read, the bases for this Court's jurisdiction was both federal question and diversity of citizenship. [*See* Doc. 25 at 24 n. 10].

Chase filed a motion to dismiss Plaintiff's complaint, asserting that the complaint failed to state a viable claim for relief. [Doc. 13]. This Court issued a Report and Recommendation ("R&R") recommending that the District Judge dismiss Plaintiff's RESPA, FDCPA, FCRA, trespass, harassment, stalking, libel, and abuse of civil process claims, allowing only her attempted claims for wrongful foreclosure and false light invasion of privacy with respect to publication of allegedly false information regarding Defendant's foreclosure notices in the newspaper to remain, [Doc. 25], which R&R the District Judge adopted in its entirety, [Doc. 31].

On April 6, 2017, Plaintiff filed a motion for reconsideration of the District Judge's Order adopting the R&R, [Doc. 32], and a motion to amend her complaint, [Doc. 33], both of which were denied, [Docs. 39, 40]. Plaintiff then filed a motion for default judgment, [Doc. 54], for sanctions, [Doc. 51], to vacate the undersigned's previous order denying her motion to amend, [Doc. 65], and a motion to compel discovery, [Doc. 74]. The undersigned denied each. [Docs. 90-91, 105].

Defendant filed the pending summary judgment motion on May 7, 2018, with an accompanying memorandum, statement of undisputed material facts ("SUMF"), declarations, and exhibits. [Docs. 82 to 82-13]. After requesting, [Doc. 86], and being granted, [Doc. 87], until June 8, 2018 to respond, Plaintiff filed her response to Defendant's motion, with an accompanying memorandum on June 11, 2018, [Docs. 92 to 92-2]. On that same date, Plaintiff also responded to Defendant's statement of material facts, [Doc. 93], and filed her own statement of material facts, [Doc. 94], a motion for judicial notice,[1] [Doc. 96], and her affidavit, [Doc. 95]. Defendant requested an extension of time to reply, [Doc. 96], which the Court granted, allowing Defendant to reply up through and including July 9, 2018, [Doc. 98].

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[1] In the motion for judicial notice, Plaintiff asks the Court to take judicial notice of the following: an FDIC public website that allegedly supports her objections to Defendant's claim that the Deed was transferred to it; a *Wall Street Journal* article that allegedly supports her "allegation of injury caused by wrongful foreclosure threats"; a forensic examination of real property and circuit court records from Osceola County, Florida, that allegedly support her claims of robosigning; a Wikipedia article to support her allegation concerning the term "public security"; and recently published cases in California state court. [*See* Doc. 96]. Attached to this motion are exhibits [Doc. 96-1], cited in Plaintiff's response in opposition to Defendant's motion, affidavit, response to Defendant's statement of material facts, and additional statement of material facts. [Docs. 92-1, 93-5]. As Plaintiff is proceeding pro se, it appears that these may have been meant as exhibits attached to Plaintiff's affidavit. As such the undersigned will consider them in referring to her response to Defendant's summary judgment motion.

Defendant then filed its reply, [Doc. 100],[2] along with its responses to Plaintiff's statement of material facts, [Doc. 99], and her motion for judicial notice[3], [Doc. 101].

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[2] Plaintiff moved to strike Defendant's reply, response to her statement of material facts, and motion for judicial notice on the grounds that they "were not served in accord with their Certificates of Service, and they were mailed extra untimely." [Doc. 102 at 2]. Specifically, Plaintiff contends that the documents' certificates of service state that they were served by mail on July 9, 2018, but postage indicates they were only mailed on July 11, 2018, and she received them July 18, 2018. [*Id.*]. Plaintiff contends they took "an unusual seven days to arrive" and, therefore, she disputes the mailing date. [*Id.*].

Defendant responds that, in addition to filing these documents electronically on July 9, 2018, it emailed them to Plaintiff on the same date, and, as Plaintiff is not required and did not file a sur-reply, she cannot show she was prejudiced by receiving the mailed copies on July 18, 2018. [Doc. 101 at 1-3].

The undersigned agrees with Defendant. As explained in prior orders, the discrepancy in the certificate of service on Defendant's reply was not in bad faith and she cannot credibly claim that she was prejudiced by it. Moreover, Plaintiff failed to adhere to the Scheduling Order in filing her motion to strike. Consequently, to the extent that Plaintiff's filing, [Doc. 102], can be construed as a motion to strike, the Court **DENIES** it.

[3] Defendant argued that the Court should deny this motion because Plaintiff only asks for judicial notice to support arguments–concerning the validity of the underlying Loan documents and Defendant's right to foreclose–that are no longer before the Court and are therefore irrelevant and not subject to judicial notice. [Doc. 101 at 2 (citing *Ballad v. Bank of Am. Corp.*, No. 1:13-CV-4011-ODE-RLV, 2014 WL 11970543, at *7 (N.D. Ga. Sept. 11, 2014); *Martincek v. LVNV Funding, LLC*, No. 1:16-cv-3587-ELR-JFK, 2017 WL2903356, at *2–3; *BRE Mariner Marco Town Ctr., LLC v. Zoom Tan, Inc.*, 682 Fed. Appx. 744, 748 n.3 (11th Cir. Mar. 13, 2017))].

With briefing completed, the pending summary judgment motion and the other motions are ripe for disposition or recommended resolution.

III. Facts

The Court previously concluded that the original promissory note ("the Note") and security deed ("the Deed") to secure property located at 6350 Klondike River Road, Lithonia, Georgia 30038 ("the Property") (collectively "the Loan") executed by Plaintiff were assigned to Defendant on June 14, 2013. It also concluded that, prior to that date, on September 25, 2008, Defendant began servicing the Loan. Additionally, it is undisputed that, beginning in 2013, Defendant sent default notices and initiated foreclosure proceedings, however, no foreclosure sale has occurred. Therefore, as the Court has made clear on more than one occasion, the validity of the Loan, who is responsible for servicing and enforcing it, and who has rights to foreclose pursuant to it, are no longer subject to dispute. [*See* Docs. 25, 31]. The only remaining issues in this case concern Plaintiff's claims for attempted wrongful foreclosure and false light invasion of privacy with respect to publication of allegedly false information contained

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The undersigned agrees that the purposes for which Plaintiff wishes the Court to take judicial notice are irrelevant to the remaining claims. Accordingly, the Court **DENIES** Plaintiff's motion for judicial notice. [Doc. 96].

in Defendant's foreclosure notices in the newspaper. [*See id.*]. The facts for purposes of analyzing these remaining claims under the pending motion are as follows.

The last complete full monthly payment (in the amount of $855.76) Plaintiff made to Defendant under the Loan was on October 10, 2012 for the October 1, 2012 installment due under the Note. [Doc. 82-2 ¶ 21[4]]. On October 1, 2012, Defendant sent Plaintiff a letter approving her request for a temporary mortgage payment reduction (or

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[4] Plaintiff objects that the declaration is inadmissible and "Loan History is . . . not material and inadmissible. Citations do not support the fact." [Doc. 93 at ¶ 21]. However, Plaintiff offers no citation to any facts or law explaining how or why this is inadmissible. [*Id.*].

As Defendant points out in reply, "the 'only permissible way . . . to establish a genuine issue of material fact' in response to a summary judgment motion is to comply with Local Rule 56.1." [Doc. 100 at 5 (citing *Reese v. Herbert* , 527 F.3d 1253, 1268 (11th Cir. 2008))]. Indeed,

> [t]his Court will deem each of the movant's facts as admitted unless the respondent: (i) directly refutes the movant's fact with concise responses supported by specific citations to evidence (including page or paragraph number); (ii) states a valid objection to the admissibility of the movant's fact; or (iii) points out that the movant's citation does not support the movant's fact or that the movant's fact is not material or otherwise has failed to comply with the provisions set out in LR 56.1 B.(1).

L.R. N.D. Ga. 56.1(B)(2)(a)(2). As Plaintiff's response offers no refutation of Defendant's fact with any specific citation, nor does it state anything more than a general objection to admissibility and materiality, she has not complied with Rule 56.1. Accordingly, her objection is **OVERRULED** and Defendant's SUMF at ¶ 21 is deemed admitted as undisputed for purposes of ruling on the summary judgment motion.

forbearance) through its Affordable Unemployment Program ("UPA"). [*Id.* at ¶¶ 22-23; Doc. 93 at ¶¶ 22-23[5]]. The UPA contains the following provisions:

- a forbearance period effective November 1, 2012 through April 1, 2013 or when Plaintiff becomes employed or stops seeking employment;
- a monthly forbearance payment of $133.05 due the first of the month (which is not a waiver of the required full monthly payment);
- missed or late monthly payments shall result in default;
- the UPA is not a loan modification and the current loan is still in full force and effect;
- Defendant may send legal notices as a condition of any foreclosure during the forbearance period; and
- Defendant can cancel the UPA without notice if there is any breach of the UPA and initiate or resume collections and foreclosure efforts.

[Doc. 82-2 at ¶ 24[6]]. Plaintiff executed the UPA on October 5, 2012. [*Id.* at ¶ 25[7]].

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[5] Although Plaintiff objects to the UPA as "inadmissible and citations do not support the fact," she "admits accepting and complying with a forbearance." [Doc. 93 at ¶¶ 22-23]. However, Plaintiff offers no citation to any facts or law explaining how or why these statements are inadmissible. [*Id.*]. Accordingly, her objection is **OVERRULED** and Defendant's SUMFs at ¶¶ 22-23 are deemed admitted as undisputed for purposes of ruling on the summary judgment motion.

[6] Plaintiff objects that the UPA is "inadmissible and citation does not support the fact." [Doc. 93 at ¶ 24]. Again, Plaintiff offers no citation to any facts or law explaining how or why this is inadmissible. [*Id.*]. Accordingly, her objection is **OVERRULED** and Defendant's SUMF at ¶ 24 is deemed admitted as undisputed for purposes of ruling on the summary judgment motion.

[7] Plaintiff objects that the UPA is "inadmissible and citation does not support the fact." [Doc. 93 at ¶ 25]. However, she "admits a forbearance was executed on Oct. 5, 2012, and the first payment made in Nov. 2012." Again, Plaintiff offers no

Plaintiff did not make her first payment under the UPA on or before November 1, 2012, but paid $135 on November 27, 2012, December 21, 2012, January 23, 2013, February 14, 2013, and March 28, 2013. [*Id.* at ¶¶ 26-27[8]]. Defendant alleges that Plaintiff continued to make payments of $134 on April 29 and May 29, 2013. [*Id.* at ¶ 28[9]].

On May 28, 2013, Defendant sent Plaintiff a three-month Trial Period Payment Plan ("TPP") that permitted her to make three "trial period payments" of $421.71 each month while being considered for a potential loan modification. [*Id.* at ¶¶ 31-32[10]].

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citation to any facts or law explaining how or why this is inadmissible. [*Id.*]. Accordingly, her objection is **OVERRULED** and Defendant's SUMF at ¶ 25 is deemed admitted as undisputed for purposes of ruling on the summary judgment motion.

[8] Plaintiff objects that "[t]he Loan History is . . . not material and inadmissible. Citation does not support the fact." [Doc. 93 at ¶¶ 26-27]. Again, Plaintiff offers no citation to any facts or law explaining how or why these statements are inadmissible. [*Id.*]. Accordingly, her objection is **OVERRULED** and Defendant's SUMFs at ¶¶ 26-27 are deemed admitted as undisputed for purposes of ruling on the summary judgment motion.

[9] *See* note 5.

[10] Plaintiff agrees that she "completed a Trial Period Payment Plan. She does not know if it is identical to the redacted "TPP[,]" but objects on the grounds that the affidavits and TPP are "not material and inadmissible. Citations do not support the fact." [Doc. 93 at ¶¶ 31-32]. Again, Plaintiff offers no citation to any facts or law explaining how or why these statements are not admissible. [*See id.*]. Accordingly, her objection is **OVERRULED** and Defendant's SUMFs at ¶¶ 31-32 are deemed admitted as undisputed for purposes of ruling on the summary judgment motion.

Like the previous UPA, the TPP stated that it did not alter the underlying Loan and Plaintiff's acceptance of it did not waive Defendant's right to accelerate the Loan or foreclose upon the Property or cure Plaintiff's default. [*Id.* at ¶¶ 33-34[11]]. On July 1 and August 16, 2013, Plaintiff made payments of $421.71. [*Id.* at ¶ 35[12]]. She also made a partial payment on September 9, 2013, which was the last payment Defendant received from her. [*Id.* at ¶¶ 36-37[13]].

On September 23, 2014, Martin & Brunavs (Defendant's foreclosure counsel) sent a Notice of Acceleration and Foreclosure letter to Plaintiff. [*Id.* at ¶ 39[14]]. At that time the unpaid principal amount on the Loan was $106.251.56. [*Id.* at ¶ 41[15]]. The Foreclosure Notice contained a Notice of Sale Under Power identifying the Deed and

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[11] Plaintiff objects that the redacted TPP is "not material and inadmissible. Citation does not support the fact." [Doc. 93 at ¶¶ 33-34]. Again, Plaintiff offers no citation to any facts or law explaining how or why this is inadmissible. [*See id.*]. Accordingly, her objection is **OVERRULED** and Defendant's SUMFs at ¶¶ 33-34 are deemed admitted as undisputed for purposes of ruling on the summary judgment motion.

[12] *See* note 5.

[13] *See* notes 5 and 7.

[14] "Plaintiff agrees that Chase retained the firm of Martin & Brunavs to initiate foreclosure proceedings in or around Sept. 2014 and mailed the Foreclosure Notice." [Doc. 93 at ¶ 39].

[15] *See* note 5.

stating that the debt secured by it "has been and is hereby declared due because of nonpayment of indebtedness when due in the manner provided in the Note and Security Deed. The debt remaining in default, the sale will be made for the purpose of paying the same. . . ." [*Id.* at ¶¶ 43-44[16]]. Foreclosure counsel caused this notice to be published in *The Champion Newspaper* in DeKalb County, Georgia on October 9, 16, 23, and 30, 2014. [*Id.* at ¶ 45[17]].

Plaintiff submitted her own statement of additional material facts. [Doc. 94]. First, she claims that "Defendant declared the debt in default on Jan. 3, 2013 while Plaintiff was current in making reduced payments as agreed in the Forbearance Agreement. [*Id.* at ¶ 2 (citing [Docs. 95 at ¶ 3, 96-1 at 18])]. However, the cited portion of Plaintiff's affidavit only states that she "had never missed a payment" and the exhibit referenced is the letter from Defendant declaring her in default. [*Id.*]. These documents do not show the Court whether Plaintiff, in fact, made any payments as specified under the Loan, UPA, or TPP. As the undersigned previously explained, general refutations unsupported "by specific citations to evidence (including page or

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[16] Plaintiff did not respond to these statements of fact. [Doc. 93 at 17]. Accordingly, they are deemed admitted under LR 56.1(B)(2)(a)(2), NDGa.

[17] "Plaintiff agrees that Chase caused default notices to be published in the Champion Newspaper on Oct. 9, Oct. 16, Oct. 23, and Oct. 30." [Doc. 93 at ¶ 45].

paragraph number)" are insufficient to raise a genuine dispute of material fact. LR 56.1(B)(2)(a)(2), NDGa. As such Plaintiff's assertion that she had not missed a payment is unsupported and does not raise a genuine, disputed material fact.

Second, Plaintiff claims that Defendant "sent a Notice of Intent to Foreclose on May 6, 2013 while Plaintiff was current in making reduced payments as agreed in the Forbearance extension, which became effective May 1, 2013." [*Id.* at ¶ 3 (citing [Docs. 95 at ¶ 3, 96-1 at 7])]. Again, the cited portion of Plaintiff's affidavit only states that she "had never missed a payment" and the exhibit referenced is a Notice of Intent to Foreclose. [*Id.*]. As such, Plaintiff's assertion that she had not missed a payment is unsupported and does not raise a genuine issue of disputed material fact.

Plaintiff's remaining allegations concern a Final Modification Agreement which Defendant denied because she "did not return the final modification agreement within the required time frame." [*Id.* at ¶¶ 4, 9-10, 12]. The contentions also reiterate her previously dismissed arguments concerning the ownership of the Loan and right to foreclose. [*Id.* at ¶¶ 13-25]. Lastly, Plaintiff asserts that she requested information concerning her Loan (specifically fees and debt disputes) to which Defendant refused to respond. [*Id.* at ¶¶ 5-8, 28-30, 36]. Notably, to the extent that any of these issues can be construed as related to the claims raised in Plaintiff's complaint–which asserted only

violations of FDCPA, RESPA, and FCRA–the Court already dismissed all claims regarding ownership rights of the Loan and disclosures related to the same. [Docs. 1, 25, 31]. Consequently, these facts, whether disputed or not, are not material to the claims presently before this Court, which concern only the publication of information concerning Plaintiff's indebtedness on the Property, which information Plaintiff claims was false.

IV. Discussion

Defendant argues that Plaintiff's remaining claims for attempted wrongful foreclosure and false light invasion of privacy should be dismissed because Plaintiff defaulted on her obligations under the Loan and, consequently, there was nothing false about their publication. [Doc. 82 at 2]. Defendant also argues that Plaintiff's false light invasion of privacy claim is time-barred by Georgia's one-year statute of limitations. [*Id.*]. The undersigned will address each argument in turn.

A. Whether Plaintiff Was in Default When Defendant Published the Foreclosure Notice

Defendant alleges that the last complete full monthly payment (in the amount of $855.76) Plaintiff made to it under the Loan was on October 10, 2012 for the October 1, 2012 installment due under the Note. [Doc. 82-2 ¶ 21]. Plaintiff responds that Defendant had no authority to foreclose because it is not the holder of the Deed or

Note, she owes Defendant no debts, or Defendant is not the Loan servicer. [Doc. 92-1]. As has been previously explained, these issues were already decided by the Court and are no longer subject to dispute. [Docs.25, 31]. Plaintiff also claims that there is no default because she has no contract with Defendant. [*Id.* at 8].

However, Plaintiff "admits a forbearance was executed on Oct. 5, 2012, and the first payment made in Nov. 2012." [Doc. 93 at ¶ 25]. Indeed, Defendant has shown that Plaintiff entered the UPA on October 5, 2012 and made her first payment under it on November 27, 2012. [Doc. 82-2 at ¶¶ 25-26]. The UPA provided that, from November 1, 2012 through April 1, 2013, Plaintiff was to make monthly payments of $133.05 to Defendant due the first of the month. [*Id.* at ¶ 24]. However, the UPA did not waive Plaintiff's obligations under the Loan and specified that missed or late payments would result in default. [*Id.*].

The undisputed facts demonstrate that Plaintiff did not make her first payment under the UPA on or before November 1, 2012, but paid $135 on November 27, 2012, December 21, 2012, January 23, 2013, February 14, 2013, and March 28, 2013. [*Id.* at ¶¶ 26-27]. Plaintiff made payments of $134 on April 29 and May 29, 2013. [*Id.* at ¶ 28]. By the UPA's very terms Plaintiff's late payment on November 27, 2013 constituted a default, as it was due on November 1, but she paid it late.

Nevertheless, the parties entered into the TPP, which required Plaintiff to make three payments of $421.71 each month for three months while being considered for a potential loan modification. [*Id.* at ¶¶ 31-22]. The TPP provided that it did not cure Plaintiff's default, alter the underlying Loan and Plaintiff's acceptance of it, or waive Defendant's right to accelerate the Loan or foreclose upon the Property. [*Id.* at ¶¶ 33-34]. On July 1 and August 16, 2013, Plaintiff made payments of $421.71. [*Id.* at ¶ 35]. She also made a partial payment on September 9, 2013, which was the last payment Defendant received from her. [*Id.* at ¶¶ 36-37]. Therefore, it is undisputed that Plaintiff was in default at the time of the TPP, failed to make complete payments under it, and neither the UPA nor the TPP relieved her of her payment responsibilities under the Loan (nor waived Defendant's rights under the same). Accordingly, she was in default as early as November 2, 2012 and, certainly by September 9, 2013, when she made her last (incomplete) payment under the TPP.

On September 23, 2014, Defendant, through foreclosure counsel, sent a Notice of Acceleration and Foreclosure letter to Plaintiff. [*Id.* at ¶ 39]. The Foreclosure Notice contained a Notice of Sale Under Power, which was published in *The Champion Newspaper* in DeKalb County, Georgia, on October 9, 16, 23, and 30, 2014, identifying the Deed and stating that the debt secured by it "has been and is hereby declared due

because of nonpayment of indebtedness when due in the manner provided in the Note and Security Deed. The debt remaining in default, the sale will be made for the purpose of paying the same. . . ." [*Id.* at ¶¶ 43-45]. As Plaintiff defaulted as early as November 2, 2012, the Notice was published on October 9, 2014, and there is no evidence that Plaintiff cured the default in the intervening time, the publication was not false.

To reiterate what the Court previously explained in recommending a ruling on Defendant's motion to dismiss,

> To state a claim for attempted wrongful foreclosure under Georgia law, Plaintiff "must establish 'a knowing and intentional publication of untrue and derogatory information concerning the debtor's financial condition, and that damages were sustained as a direct result of this publication.' " *Fenello v. Bank of Am., N.A.*, 926 F. Supp. 2d 1342, 1353 (N.D. Ga. 2013) (Duffey, J.) (quoting *Jenkins v. McCalla Raymer, LLC*, 492 Fed. Appx. 968, 972 (11th Cir. Oct. 25, 2012), and *Aetna Fin. Co. v. Culpepper*, 171 Ga. App. 315, 319, 320 S.E.2d 228, 232 (1984)); *Mayrant v. Deutsche Bank Trust Co. Ams.*, Civ. Action File No. 1:10-CV-3094-TWT, 2011 WL 1897674, at *2 (N.D. Ga. May 17, 2011) (Thrash, J.) (also quoting *Culpepper*, *supra*).
>
> Plaintiff's complaint alleges that Defendant wrongfully attempted to foreclose on the Property because it published false foreclosure notices starting in 2013 and presented false information regarding her financial condition to law firms and credit bureaus. [Doc. 1 at 51]. Specifically, Plaintiff alleges that Defendant falsely alleged she was in default when she was not. [*Id.*].

. . .

> In order to sustain a false light invasion of privacy claim, a plaintiff must allege sufficient facts to establish a plausible claim that a defendant knowingly or recklessly published falsehoods about her and, as a result, placed her in a false light which would be highly offensive to a reasonable person. *See Smith v. Stewart*, 291 Ga. App. 86, 100, 660 S.E.2d 822, 834 (2008). In order to be actionable, a false light invasion of privacy claim must be distributed to the public at large. *Blakey v. Victory Equip. Sales, Inc.*, 259 Ga. App. 34, 37, 576 S.E.2d 288, 292 (2002). The plaintiff in a false light case also must establish that the publicity was in fact false. *See Pospicil v. Buying Office, Inc.*, 71 F. Supp. 2d 1346, 1362 (N.D.Ga. 1999) (Forrester, J.).
>
> Plaintiff claims that Defendant published information that placed her in a false light by (1) presenting inaccurate financial information to three law firms and publishing false information in the local paper related to the wrongful foreclosure attempts, and (2) filing a frivolous complaint for declaratory judgment in state court. [Doc. 1 at 41].

[Doc. 25 at 25-26, 31]. In that earlier R&R, adopted by the District Judge, the undersigned recommended that the District Judge conclude that Defendant had failed to establish that Plaintiff was in default because Plaintiff's complaint alleged that she was still current on her loan and in the forbearance period in December 2013 when Defendant published the foreclosure notice. [*Id.* at 27 (citing [Doc. 1 at 51-52, 121]), 32]. However, in the current motion for summary judgment, Defendant has shown that, even by the terms of the forbearance agreement (or UPA), Plaintiff was in default as early as November 2, 2012, and Plaintiff has offered no evidence that she cured this

default or otherwise entered another type of forbearance or loan modification agreement by the time Defendant published the foreclosure notices in 2014. Therefore, the notices published by Defendant were not false and Plaintiff cannot establish these requisite elements of her attempted wrongful foreclosure and false light invasion of privacy claims.

Accordingly, the undersigned **RECOMMENDS** that the District Judge **GRANT** Defendant's summary judgment motion, [Doc. 82], and **DISMISS** Plaintiff's remaining claims **WITH PREJUDICE**.

B. Whether Plaintiff's False Light Invasion of Privacy Claim is Barred by Georgia's One-Year Statue of Limitations

In the event the District Judge does not agree with the undersigned's conclusion that Plaintiff's false light privacy claim is due to be dismissed because she was in default and thus Defendant did not make any statements that held her in a false light, the Court also addresses Defendant's alternative argument. Defendant argues that Plaintiff's false light invasion of privacy claim is time-barred by Georgia's one-year statute of limitations under O.C.G.A. § 9-3-33. [Doc. 82-1 at 15]. In Georgia, any injuries to an individual's reputation–which includes false light invasion of privacy–"shall be brought within one year after the right of action accrues[.]"

O.C.G.A. § 9-3-33; *Torrance v. Morris Pub. Grp. LLC*, 281 Ga. App. 563, 566, 636 S.E.2d 740, 743 (2006) ("[T]he one-year limitation period applies to claims of libel and 'false light' invasion of privacy,[ ] as well as conspiracy to libel and slander.") (footnotes and internal citations omitted). Defendant's foreclosure counsel published the Notice of Sale Under Power in *The Champion Newspaper* in DeKalb County, Georgia, on October 9, 16, 23, and 30, 2014. [Doc. 82-1 at ¶¶ 43-45]. Plaintiff's complaint alleging false light invasion of privacy was filed April 15, 2016, outside of the one-year limitations period of § 9-3-33. [Doc. 1]. Therefore, she filed her complaint after the statute of limitations had run.

Plaintiff argues that the statute of limitations should be equitably tolled because of "the injury, the five cease-and-desist letters she sent to Chase, its dual tracking, unnecessary foreclosure threats while she was current, and refusal to provide fee disclosures, in addition to any other acts." [Doc. 92-1 at 6]. Defendant replies that Plaintiff "fails to set fort any competent summary judgment evidence to demonstrate equitable tolling." [Doc. 100 at 7]. Defendant contends that equitable tolling is applicable when a litigant has diligently pursued his rights and there is some extraordinary circumstance that prevented timely filing. [*Id.* (citing *Menominee Indian Tribe of Wis. v. United States*, 136 S. Ct. 750, 755 (2016); *Villareal v. R.J. Reynolds*

Tobacco Co., 839 F.3d 958, 871 (11th Cir. 2016))]. Here, Defendant argues that Plaintiff's claim for equitable tolling is based on conclusory allegations lacking any evidentiary or legal support. [*Id.* at 7-8].

The undersigned agrees, although the standard to be applied here is one of state, and not federal, law.[18] "Georgia's non-statutory doctrine of equitable tolling is extremely narrow." *Hicks v. City of Savannah*, No. CV408-006, 2008 WL 2677128, at *2 (S.D. Ga. July 8, 2008); *see also Bost v. Fed. Express Corp.*, 372 F.3d 1233, 1242 (11th Cir. 2004) ("Equitable tolling is an extraordinary remedy which should be extended only sparingly."). Under Georgia law, when a plaintiff seeks equitable tolling on the basis of fraud—as Plaintiff generally does here—" '[t]he statute of limitation is tolled until the actual fraud is discovered or by reasonable diligence *should have been discovered*.' " *Clark v. Chase Bank USA, N.A.*, 643 Fed. Appx. 838, 840 (11th Cir. Feb. 12, 2016) (quoting *Gerald v. Doran*, 169 Ga. App. 22, 23, 311 S.E.2d 225, 226 (1983) (emphasis in original)); *see also Hamburger v. PFM*

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[18] A federal court sitting in diversity must apply the substantive law, including statutes of limitations, of the relevant state, which in this case is Georgia. *See Mississippi Valley Title Ins. Co. v. Thompson*, 802 F.3d 1248, 1251 (11th Cir. 2015).

Capital Mgmt., Inc., 286 Ga. App. 382, 388, 649 S.E.2d 779, 784-85 (2007)[19]; *cf.*, *Fuller v. Dreischarf*, 238 Ga. App. 18, 20, 517 S.E.2d 89, 91 (1999) (holding that "plaintiffs cannot rely on the equitable tolling provisions of OCGA § 9-3-96 because they failed to exercise reasonable diligence to discover the fraud. . . ."). "Mere ignorance of facts constituting a cause of action does not prevent the running of a

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[19] The *Hamburger* court aptly summarized Georgia law on limitations and equitable tolling, explaining that equitable tolling is appropriate when:

> "The defendant . . . is guilty of a fraud by which the plaintiff has been debarred or deterred from bringing an action, the period of limitation shall run only from the time of the plaintiffs discovery of the fraud." In cases where the gravamen of the underlying cause of action is actual fraud, "the statute of limitations is tolled until the fraud is discovered or by reasonable diligence should have been discovered." And "[f]ailure to exercise reasonable diligence to discover the fraud may be excused where a relationship of trust and confidence exists between the parties." In contrast, "where the gravamen of the underlying action is not a claim of fraud, . . . the statute of limitations is tolled only upon a showing of a separate independent actual fraud involving moral turpitude which deters a plaintiff from filing suit. In such cases, before the running of the limitation period will toll, it must be shown that the defendant concealed information by an intentional act-something more than a mere failure, with fraudulent intent, to disclose such conduct, unless there is on the party committing such wrong a duty to make a disclosure thereof by reason of facts and circumstances, or the existence between the parties of a confidential relationship."

Hamburger, 286 Ga. App. at 388, 649 S.E.2d at 784-85 (citations and footnotes omitted, paragraph breaks deleted).

statute of limitations." *Gerald*, 169 Ga. App. at 23, 311 S.E.2d at 226 (citations omitted); *see also Everhart v. Rich's, Inc.*, 229 Ga. 798, 803, 194 S.E.2d 425, 429 (1972) ("ignorance . . . absent the element of fraud, does not toll a statute of limitation").

Even assuming Plaintiff had not defaulted on her loan and Defendant's publication of the Notice was false, her invocation of the doctrine of equitable tolling is utterly bereft of any factual or legal support. Indeed, she relies on perfunctory and conclusory claims concerning Defendant's right to foreclose and disclosures, claims that the District Court already dismissed. Furthermore, Plaintiff's stated reasons for not acting within the statute of limitations—"the injury, the five cease-and-desist letters she sent to Chase, its dual tracking, unnecessary foreclosure threats while she was current, and refusal to provide fee disclosures, in addition to any other acts," [Doc. 92-1 at 6]—demonstrate that Defendant did not act so as to dissuade or debar Plaintiff from timely filing suit. Thus, her equitable tolling argument is rejected.

Accordingly, the undersigned **RECOMMENDS** that the District Judge **GRANT** Defendant's motion for summary judgment and **DISMISS** Plaintiff's false light invasion of privacy claim as having been filed outside of the statute of limitations.

V. Conclusion

For the reasons set forth above, Plaintiff's motion for judicial notice, [Doc. 96], and to strike Defendant's reply, response to her statement of material facts, and response to her motion for judicial notice, [Doc. 102], are **DENIED**. Further, the undersigned **RECOMMENDS** that the District Judge **GRANT** Defendant's summary judgment motion, [Doc. 82], and **DISMISS** Plaintiff's complaint **WITH PREJUDICE**.

The Clerk of the Court is **DIRECTED** to **TERMINATE** the reference to the undersigned.

IT IS SO ORDERED, RECOMMENDED, and DIRECTED, this the 3rd day of January, 2019.

ALAN J. BAVERMAN
UNITED STATES MAGISTRATE JUDGE

Additional material from this filing is available in the Clerk's Office.